Supreme Court, U. S.
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MICHAEL RODAK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 318

Jo-Ann Bykofsky, on her own behalf and on the behalf of her son, a minor, Shaw Bykofsky, as his guardian,
Petitioners

v.

The Borough of Middletown, *et al.*,
Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

JURISDICTION

STATUTE INVOLVED

Respondents are satisfied with Petitioners' presentation under the foregoing three headings.

QUESTIONS PRESENTED

Whether the juvenile nocturnal curfew ordinance of the Borough of Middletown, on its face, unconstitutionally infringes upon rights of Petitioner Shaw Bykofsky to move freely about in public and to associate with others, and a right of Petitioner Jo-Ann Bykofsky to raise her family without governmental interference.

STATEMENT OF THE CASE

The Middletown Curfew Ordinance is the product of a half-year of hearings and discussions involving the Borough Council, its Police Committee, the Mayor, and the Borough Solicitor (Ct. App. A. 56-57, 62). It was based upon discussions with the police, the experience of the nine members of Borough Council (Ct. App. A. 59), and evidence from the police records, reflected in the findings in the Ordinance, that the prior curfew was an effective means of decreasing juvenile nocturnal crime (Ct. App. A. 117, 94-98, 143-44).

The Curfew Ordinance provides (§4) that no minor under the age of eighteen shall be or remain in or upon the streets within the Borough of Middletown between the hours of 10:00 or 11:00 P.M. (depending upon age) and 6:00 A.M., unless the minor comes within one of the numerous exceptions.

Minors who come within one of the following exceptions (§5) are not subject to the curfew:

1. When the minor is accompanied by his parent or guardian;

2. When the minor is accompanied by an adult authorized by his parent or guardian;

3. When the minor is exercising First Amendment rights;

4. In a case of reasonable necessity;

5. When the minor is on the sidewalk of his residence or that of either next-door neighbor;

6. When the minor is returning home by a direct route from, and within thirty minutes of the termination of, a school activity or an activity of a religious or other voluntary association;

7. When the minor's necessary nighttime activities are inadequately provided for by other exceptions,

he may obtain a special permit from the Mayor on a finding of necessity for use of the streets;

8. Under the same situation prevailing in 7, by general regulation of the Mayor where too many persons are involved for use of the individualized permit procedure of exception 7;

9. When the minor carries a certified card of employment;

10. When the minor is in a motor vehicle with parental consent for interstate travel or as otherwise permitted by another exception.

Certain of these exceptions (3, 4, and 6) require the giving of notice to Borough officials. This notice performs the function of informing the police as to the intended use of the streets, decreases the minor's likelihood of having difficulty with the authorities after curfew hour, and by the terms of the Ordinance, is part of Borough Council's mandatory continuing evaluation of the curfew. (§10). The authorities have no discretion to deny availability of an exception calling for notice; if the notice is given, the exception is available.

The purposes of the Middletown Curfew Ordinance are: (1) The protection, welfare, and safety of youth and younger children (Ct. App. A. 57-58, 72, 104-05); (2) To increase parental responsibility for children (Ct. App. A. 57-58, 72-73); (3) Prevention and control of juvenile delinquency and juvenile criminal activities (Ct. App. A. 77, 57, 104-05, 143-44); and (4) To have an Ordinance which is constitutional and does not unlawfully restrict the exercise of protected rights. (Ct. App. A. 57-58).

At the trial, Chief of Police Mrakovich produced statistics from the Middletown police records showing that crime committed by persons of curfew age undergoes a

greater relative decrease during curfew hours than does crime committed by persons not subject to the curfew. (Def't Trial Ex. 1, Ct. App. A. 117, 113; also 94-98). Those police records also evidenced a sharp rise in crime within the age group of persons sixteen and seventeen years old, who became subject to the curfew only upon passage of the existing Ordinance. (Def't Trial Ex. 2, Ct. App. A. 118, 113; also 99-101).

REASONS FOR DENYING THE WRIT

Petitioners challenge, on its face, a juvenile nocturnal curfew ordinance, never applied against them, which is not representative of such ordinances generally.

As indicated by the existing curfew cases, the leading law review treatment of the subject, and municipal law forms, the most atypical feature of this Ordinance lies in the character and scope of its exceptions, which is the area in which the courts have found most of the legal issues to be focused. *See* cases cited at Petition 13; NOTE, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime*, 107 *Univ. of Pa. L. Rev.* 66, 75-76 (1958); Chrostwaite, *Pennsylvania Municipal Ordinances* 209-10 (1954); I National Institute of Municipal Law Officers Model Ordinance Service §7-400.1, *et seq.* (1973).

The uniqueness of this Ordinance is highlighted most by the presence of exceptions for minors exercising First Amendment rights and traveling in motor vehicles, both of which answer issues sought to be raised in this case.

The juvenile nocturnal curfew is not a judicially active area of the law. The subject has been considered only three times by law reviews,[1] and approximately fifteen cases (two in federal court) have arisen in the 78 years since the subject first appeared in the courts.[2] This is the only case to reach a federal court of appeals. Although the petition (p. 7) states that 3,000 cities and villages have juvenile curfew ordinances, this represents less than 9% of the 35,508 municipalities and townships in the United States. United States Dep't of Commerce, 1972 *Census of Governments*, Vol. 1, p. 23.

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1. NOTE, *Constitutional Law—Juvenile Rights*, 54 *Texas L. Rev.* 812 (1976); Note, *supra*, 107 *Univ. of Pa. L. Rev.* 66; Comment, Constitutional Law-Police Power-Municipal Ordinance, 1 *Vill. L. Rev.* 51 (1956).

2. Cases cited at Petition 13.

Consideration by this Court of juvenile nocturnal curfews, if given at all, should await a case in which such an ordinance has actually been applied. Given the range of issues raised and the fact that the attack is facial, the Court would have to make detailed factual assumptions or treat the issues in a vacuum. The absence of the vagueness issue in a facial attack setting means that Petitioners are requesting the Court to determine that this Curfew Ordinance could not be constitutionally applied, a position which is without support under present law.

The validity of juvenile curfew ordinances also depends substantially upon the factual situation existing in the community involved. NOTE, *supra*, 107 *Univ. of Pa. L. Rev.* at 100-01. The court below, on the basis of the evidence presented concerning Middletown, determined that the purposes of the curfew, admitted by Petitioners to be valid, were in fact served by this Ordinance. In view of the differences among communities, this is a less appropriate area for decision by a court of nationwide jurisdiction. It would be preferable to await decisions by other courts in various community settings. In effect, the issue of juvenile curfews is not ripe for decision by this Court.

This is the least restrictive juvenile nocturnal curfew ordinance to reach the courts. Although Petitioners claim that a conflict exists among lower court decisions, no such conflict is present with regard to this particular Ordinance. No ordinance having this breadth of exceptions has been held invalid.

The District Court correctly applied settled legal concepts to this new fact situation. The Court of Appeals did not see a need to change, expand, or comment upon either the reasoning or the conclusion of the District Court, and therefore affirmed without opinion.

The constitutional rights of minors are not co-extensive with those of adults, and a state may constitutionally regulate minors to a greater degree than it may regulate adults. *Ginsberg v. New York*, 390 U.S. 629, 638 (1968);

Prince v. Massachusetts, 321 U.S. 158, 168 (1944); *Foe v. Vanderhoof*, 389 F. Supp. 947, 953 (D. Colo. 1975); *Poe v. Gerstein*, 517 F.2d 787, 790 (5th Cir. 1975), *aff'd sub nom., Gerstein v. Coe*, 44 U.S.L.W. 3760 (U.S. July 6, 1976). The court below properly recognized that the extension of constitutional rights to minors has been limited rather than general, and has occurred only in certain areas of constitutional rights, namely, the First Amendment, equal protection (classifications based other than upon age), and procedural due process, arising in the context of the educational system or juvenile court proceedings. 401 F. Supp. at 1253-54, and cases there cited; *Poe v. Gerstein, supra*, 517 F.2d at 790, and cases there cited. This Curfew Ordinance does not fit within those recognized areas.

Even in the realm of procedural due process, where the rights of minors have undergone the greatest expansion, those rights are not today co-extensive with those of adults. In *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), the Court refused to extend the right of jury trial to the adjudicative phase of state juvenile court delinquency proceedings, in spite of the fact that the Court acknowledged that trial by jury in criminal cases was fundamental to the American scheme of justice. 403 U.S. at 540.

A municipality may constitutionally impose reasonable restrictions of time, place, and manner upon proper uses of its streets. *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941). Such restrictions could even exceed those involved here in the sense that they could even relate to use of the streets for First Amendment purposes. *Hudgens v. N.L.R.B.*, 96 S.Ct. 1029 (1976). The notice provision for use of the First Amendment exception does not destroy the reasonableness of the curfew regulation. A government may adopt reasonable time, place, and manner restrictions, not related to content, in order to further an important governmental interest not related to communication. *Buckley v. Valeo*, 96 S.Ct. 612 (1976).

Where juvenile curfew ordinances have been held unconstitutional, it has been on the grounds that they either suffered from vagueness or were overbroad in their application. The issue of vagueness is not now present in this case (*see* Petition 6), and the cases which have invalidated curfew ordinances on grounds of overbreadth have done so because the exceptions were too narrowly limited. *See e.g. In re Doe*, 513 P.2d 1385 (Haw. Sup. Ct. 1973). In view of the exceptions contained in the Middletown Curfew Ordinance, the area of actual circumscription of movement is small, and in light of the existing cases affords no basis for holding the ordinance invalid.

While Petitioners cite cases which indicate in a general way the existence of the rights they assert, those cases do not establish that the rights are unlimited, or that this Ordinance affects them in an unconstitutional manner. In asserting the abridgement of the various rights, Petitioners do not focus upon their application to the narrow area of circumscription remaining after exceptions to the Ordinance are taken into account. As to the parent, Petitioners claim fundamental status for a non-fundamental right. As to the minor, Petitioners fail to establish a satisfactory nexus between the rights asserted and the manner in which the Ordinance affects them. It is not enough to assert a denial of liberty without pointing to a "specific constitutional guarantee" safeguarding the interests claimed to have been invaded. *See Paul v. Davis*, 96 S.Ct. 1155, 1160 (1976).

The right of parents to control the upbringing of their children has not been applied generally, or in the abstract, but has been focused in particular circumstances and/or coupled with another, more important, constitutional right. The right of the parents has been applied or recognized almost exclusively in situations involving religious upbringing, education, or control of the child in the parental home. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972);

Stanley v. Illinois, 405 U.S. 645 (1972); *Ginsberg v. New York, supra; Prince v. Massachusetts, supra; Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

The religious upbringing, education, and parental household settings are not present in this case. Contrary to the assertions of the Petitioners, the right of parents to control the upbringing of their children is not fundamental. *Baker v. Owen*, 395 F. Supp. 294, 299 (M.D.N.C. 1975), *aff'd*, 96 S.Ct. 210 (1975). Where the parental rights have been considered fundamental under particular circumstances, it was because another right was coupled with it, as the right to free exercise of religion in *Wisconsin v. Yoder, supra*, 406 U.S. at 233. *See Scoma v. Chicago Bd. of Educ.*, 391 F. Supp., 452, 460-61 (N.D. Ill. 1974). By contrast, this case is dealing with the right of parents to allow children out on the streets at night, a right which is simply not of the degree of importance of the right of parents to control the religious upbringing or the education of their children, or the right of parents to have control over their children at home. *Cf. Baker v. Owen, supra*, 395 F. Supp. at 300.

In the absence of infringement upon fundamental constitutional rights or the creation of a suspect classification, the court below was correct in refraining from application of the compelling state interest test for equal protection purposes. *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972); Winter, *The Changing Parameters of Substantive Equal Protection: From the Warren to the Burger Era*, 23 *Emory L.J.*, 657, 662-64 (1974).

As addressed above, Petitioners have not established a sufficient nexus between their asserted rights and the Ordinance. Stripped of its generality, the right which is really asserted here is the right of a person under the age of eighteen to free use of the streets after 10:00 or 11:00 P.M.

It has also been determined that age is not a suspect classification. *Hammond v. Marx*, 406 F. Supp. 853, 856 (D. Maine 1975). Furthermore, it has been recognized that the community has a special interest in the protection of children and in the reduction of juvenile nocturnal crime. *In re C*, 105 Cal. Rptr. 113, 119, 28 Cal. App. 3d 747, 754 (1972). The law has long recognized the validity of classifications based upon age. *Id.* 105 Cal. Rptr. at 120, 28 Cal. App. 3d at 757.

The court below accordingly properly applied the rational basis test: the court below recognized, and Petitioners admitted, the validity of the purposes sought to be served by the curfew, and the court found from the evidence presented to it that those purposes were in fact served by the Ordinance.

Under these circumstances, this court would be presented at an operative level with either of two issues: whether the court below properly evaluated the evidence before it, or whether juvenile nocturnal curfew ordinances are necessarily unconstitutional.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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